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Nos. 97-1519, 97-1520

In The

Supreme Court of the United States

October Term, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

AT&T CORP., et al.,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit was correct in enforcing its mandate and in ordering the Federal Communications Commission (FCC) to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271, as the Court's decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997) requires?

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16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1996) 9

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STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act) was designed to encourage competition in the local telephone industry by requiring the local exchange carriers to provide competitors access to their facilities. The Act gave state regulatory commissions the authority to set prices for such access. 47 U.S.C. section 252(c)(2).[1] Section 252(d) lists the pricing standards that state commissions must apply to determine appropriate rates. 47 U.S.C. section 252(d)(1)(A)(i).

Following the signing of the Act, the FCC adopted extensive pricing regulations for interconnection, unbundled access, resale and transport and termination of local telecommunications services. *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First R&O)*, 11 F.C.C.R. 15499 (1996). In particular, the FCC regulations required state commissions to employ the "total element long run incremental cost" (TELRIC) method for determining the rates "based on the cost" required by section 252(d)(1)(A)(i). *First R & O* at ¶ 672. Twenty-eight states and the National Association of Regulatory Utility Commissioners sought review and relief from these pricing regulations.

In its July 18, 1997, opinion reviewing the FCC's regulations, the Eighth Circuit Court of Appeals

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[1] In addition, Section 2(b) of the 1934 Communications Act, 47 U.S.C. § 152 (b), continued to prohibit the FCC from regulating intrastate ratemaking matters reserved to the states.

concluded "that the FCC exceeded its jurisdiction in promulgating the pricing rules."[2] 120 F.3d at 794. It concluded "that the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." 120 F.3d at 796. The Court further determined the FCC could not use its review or enforcement authority under 47 U.S.C. section 208 to review and redetermine state commission determinations of the just and reasonable rates that incumbent local exchange carriers can charge their competitors. 120 F.3d at 804. To do so would "undermine" the jurisdictional decision. *Id.*

Scarcely one month after the Eighth Circuit issued its ruling, the FCC attempted to utilize its authority under section 271 to evade the jurisdictional ruling. The FCC conditioned entry of the Bell Operating Companies (BOCs) into the long distance market on compliance with the FCC-mandated pricing method recently vacated as beyond the FCC's jurisdiction by the Eighth Circuit. *Application of Ameritech Michigan Pursuant to Section 217 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan (Ameritech Order)*, CC Docket No. 97-298, FCC No. 97-298 (Aug. 19, 1997). Pet. App. 21a-32a.[3] Section 271 grants the FCC the

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[2] Petitions for certiorari of this decision, as well as the Court's decision reviewing the Second Report and Order were granted on January 23, 1998.

[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Federal Communications Commission, et al. v. Iowa Utilities Board, et al., No. 97-1519.*

authority to approve entry by the BOCs into the interLATA long distance market.[4] To enter, the FCC must find the BOC meets a 14-point "competitive checklist" created by section 271(c)(2)(B) and entrance must be consistent with the public interest. Included in the "checklist" is the requirement that BOCs demonstrate interconnection and access in accordance with sections 251(c)(2) and (3) and 252(d)(1).[5]

In denying Ameritech's application for interLATA entry in the state of Michigan, the FCC took the opportunity to provide guidance concerning the public interest standard that it would apply in evaluating future section 271 applications. *Ameritech Order* at ¶ 6. In this ostensibly advisory portion of the order, the FCC stated that for a BOC to show it has made available "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)," the first checklist requirement,[6] the BOC must demonstrate use of the FCC's version of the TELRIC pricing methodology. Pet. App. 28a. The FCC also stated that as a condition of authorization it would require continuing compliance with the TELRIC pricing requirements to provide in-region interLATA services. Pet. App. 33a-34a.

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[4] After consultation with the states and the Department of Justice, the FCC may approve entry if the BOC has met certain conditions designed to ensure a competitive environment exists in a state. *See* 47 U.S.C. § 271(c)(2)(B).

[5] Section 252(d)(1) contains the pricing standard to be applied by State commissions in determining just and reasonable rates for interconnection.

[6] Section 271(c)(2)(B)(i); 47 U.S.C. § 271(c)(2)(B)(i).

Several parties, including the State Commission Respondents and NARUC, filed motions requesting the Eighth Circuit to issue and enforce the mandate in the case of *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). These parties claimed the requirement of TELRIC pricing as a condition precedent to BOC entry was tantamount to reestablishing pricing standards contrary to the Eighth Circuit's ruling. On January 22, 1998, the Eighth Circuit held the FCC violated the central tenet of the Court's ruling when it issued its *Ameritech Order* of August 19, 1997. Pet. App. 5a. The Eighth Circuit reiterated its decision that the state commissions have exclusive jurisdiction to regulate prices and rejected the FCC's reassertion of local pricing authority under section 271, finding it lacked "even the scent of merit." Pet. App. 11a. It directed the clerk to issue a writ of mandamus ordering the FCC to abide by the mandate and to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies regarding the pricing of interconnection, unbundled access, resale, and transport and termination of local telecommunications traffic. Pet. App. 5a; 1a-2a.

In March, 1998, the FCC and AT&T filed petitions for a writ of certiorari requesting this Court to consolidate review of the question presented in these petitions with its review of the questions presented in the petitions for certiorari in No. 97-826 and related cases.

REASONS FOR HOLDING THE PETITIONS

The State Commission Respondents and NARUC request that the Court hold the petitions pending review of the Eighth Circuit's decisions in No. 97-826 and related cases.[7] If this Court reverses the Eighth Circuit's jurisdictional decision, the reversal will require the writ of mandamus to be vacated. Affirmance of the Eighth Circuit jurisdictional ruling on pricing will require denial of the petitions for certiorari. Therefore, there is no need to consolidate the review of the questions presented in this petition with the review of the questions presented in the petitions for certiorari in No. 97-826 and related cases.

1. If the Court reverses the Eighth Circuit's jurisdictional ruling, the FCC will have the direct authority under sections 251 and 252 to define pricing. In that case, the Court will be required to grant the petitions and vacate the writ of mandamus, which rests on the Eighth Circuit's jurisdictional holding that Congress vested pricing authority with the states. The case would then be remanded for dismissal as moot.

2. If the Court affirms state authority to define pricing under section 252(d), then those decisions must be given effect in interpreting section 271(c)(2)(B)(i), which incorporates section 252(d)(1). It is the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *See, e.g., C.I.R. v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993), *on remand*, 1 F.3d 287 (5th Cir. 1993). Section 271 incorporates by reference the pricing

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[7] The FCC presented this disposition as an alternative in its petition. FCC Pet. at. p. 30.

standards which the states are granted exclusive authority to interpret under section 252(d). Once it is determined that states have exclusive authority over pricing under section 252(d), subject to federal district court review,[8] then that authority must be recognized in construing section 271. Acts of Congress should not be read as a series of unrelated and isolated provisions. *See Gustafson v. Alloyd Co. Inc.*, 513 U.S. 570 (1995), *on remand*, 53 F.3d 1078 (7th Cir. 1995). Here, section 271 and 252(d) must be construed together respecting state power over interconnection pricing (section 252(d)) by requiring deference to state exercise of pricing authority in section 271 proceedings.

3. It is also an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 248 (1985). The FCC's assertion of independent authority to define pricing standards for BOC entry could leave state commission pricing determinations, including those favorably reviewed by federal districts courts, without practical effect, in contravention of this basic rule of statutory construction. The FCC stated in its *Ameritech Order* that a BOC could not comply with the first checklist item if prices were determined using a methodology other than TELRIC. Pet. App. 29a-30a. If a state commission adopted prices under

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[8] State commission actions are reviewable by an appropriate Federal district court to determine whether the agreement or statement meets the requirements of sections 251 and 252. *See* 47 U.S.C. 252(e)(6).

sections 251 and 252 applying a methodology that differed from the TELRIC methodology required by the FCC for checklist compliance, a BOC would be precluded *ab initio* from entering the interLATA market. This outright prohibition on entry would lead to impasse between federal and state jurisdictions because a BOC would be faced with conflicting requirements on interconnection pricing in violation of the clear intent of section 271. The Eighth Circuit aptly described the TELRIC requirement as "clearly calculated to have a chilling effect on the state commissions' employment of non-TELRIC pricing schemes." Pet. App. 18a. Because the BOCs control roughly 80 percent of all access lines in the United States, the final outcome of this "intimidation tactic" would be to force states to adopt the FCC pricing standards or forego interLATA competition in their states.[9] *Id.* If the right to set prices is vested with the states, the FCC cannot extend its authority under the competitive checklist to undermine that jurisdiction. To allow this result would render state authority and the jurisdictional decision of the Eighth Circuit meaningless for four-fifths of the nation's telephone customers.

The FCC retains all requisite authority to review the competitive situation in each state and to make the ultimate decision to grant or deny BOC entry as envisioned by the Act. BOC entry should be dependent on a finding the local market is open to competition, not on an illegal

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[9] Because there is a continuing compliance requirement, states would be required to completely relinquish their pricing authority in order for BOCs to retain interLATA authority.

extension of the competitive checklist to require application of the FCC's pricing methodology.[10] The FCC's interpretation of its authority is not a necessary construction to discharge its duty under section 271.

4. The FCC contends that the mandamus order should be vacated because the Eighth Circuit lacked jurisdiction to consider issues arising under section 271.[11] The Eighth Circuit did not review the FCC's basis for denying the Ameritech 271 application, rather it properly left "the Ameritech Order untouched." Pet. App. 19a. The Eighth Circuit precluded the FCC from "using the advisory portion of its order as a vehicle by which it could intimidate state commissions. . . . " Pet. App. 19a. Since the pricing portion of the order was advisory, there has been no interference with the jurisdiction of the D.C. Circuit. Instead, the Eighth Circuit appropriately acted to protect its own jurisdiction to construe section 252(d) in the face of a deliberate FCC attempt to evade that decision by imposing its favored pricing methodology through section 271.[12] The Eighth Circuit's decision thus fully accords with the Wright, Miller & Cooper treatise on Federal Practice, cited by the FCC,[13] inasmuch as it dealt with an issue that lay within its jurisdiction in the past

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[10] The Act itself prohibits the FCC from extending the terms used in the competitive checklist. Section 271(d)(4).

[11] Section 402(a)(9) of the Communications Act, 47 U.S.C. section 402(a)(9), provides for review of Section 271 decisions in the Court of Appeals for the District of Columbia Circuit.

[12] Indeed, acceptance of the FCC's argument would allow it to evade the jurisdiction of every Court of Appeals except the D.C. Circuit by insertion of any sort of advisory material in a section 271 order.

[13] FCC Pet. at pp. 26-27.

and did not issue a writ to a tribunal whose decision could only be properly reviewed in another Circuit. *See* C. Wright, A. Miller & E. Cooper, 16 *Federal Practice and Procedure* § 3932, at 473-474 (1996) (footnote omitted).

Not only is the Eighth Circuit's decision fully correct; it is not certworthy. The decision is not a departure "from the accepted and usual course of judicial proceedings" as required by the Supreme Court Rule 10(a). The FCC is, not surprisingly, unable to marshal relevant precedent dealing with the unique circumstances in which an agency attempts to use an advisory opinion to defeat a Circuit Court's decision and then claims that advisory opinion is only reviewable in another Circuit. To the extent there is an "important question of federal law . . . " of the kind required by Supreme Court Rule 10(b) it is the construction of Section 252(d), which is already being considered by this Court.

CONCLUSION

The petitions for certiorari already under review involve complex issues arising under sections 251 and 252. They should not be allowed to become vehicles for a general review proceeding of all aspects of the Telecommunications Act of 1996. The new petitions for certiorari now being considered are inconsistent with basic principles of statutory construction and are not independently worthy of review. Indeed, dispositions of the new petitions will be largely ministerial once the Court makes its jurisdictional decision.

The Court should therefore hold the petitions pending review of the Eighth Circuit's decisions in No. 97-826 and related cases. If the Court affirms the jurisdictional ruling of the Eighth Circuit, the petitions must be denied. If the Court reverses the Eighth Circuit on pricing jurisdiction, the petitions should be granted and the writ of mandamus vacated. If the Court grants review and consolidates review of this question with the questions raised in No. 97-826 and related cases, separate argument should be granted.

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